No. 7010

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATE OF AMERICA,

Appellant,

vs.

CARL R. FRANCIS,

Appellee.

Brief of Appellant

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STATEMENT OF THE CASE

This is an action in which the plaintiff sought to secure payment from the United States of America on a certain War Risk Insurance Contract in the sum of $10,000.00. The case was tried on June 9, 1932, before the Court with a jury. The jury returned a verdict for the plaintiff, finding that the plaintiff became permanently and totally disabled on May 10, 1918. Judgment was rendered for the plaintiff on June 17, 1932, from which judgment the defendant appeals.

The undisputed facts in this case are that Carl R. Francis, the plaintiff in this action enlisted in the Army of the United States on July 28, 1917, and that on January 22, 1918, he made application for, and was granted by the Bureau of War Risk Insurance, a contract of $10,000.00 insurance payable to him in the event of permanent total disability and to his beneficiary in case of death, in installments of $57.50 per month. He was discharged from the Army on December 23, 1918, and continued to pay his premiums on said insurance for the months of January and February and March, but failed and neglected to pay the premium due April 1, 1919 and the insurance lapsed and was cancelled for nonpayment of premium due for the month of April on May 1, 1919. He was wounded by a piece of shrapnel on the night of May

10, 1918, while acting as a guide for the 2nd Platoon of A Company, 16th Infantry, back of the town of Buray, France. He was therefore taken to hospitals and treated until the time of his discharge. He made a claim to the United States Veterans' Bureau and this claim was denied and the Court has jurisdiction of this action.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

Comes now the United States of America, defendant and appellant in the above entitled action, and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the judgment in said suit made and entered by the above entitled Court on the 17th day of June, 1932.

1. The Court erred in denying the defendant's motion to direct a verdict in favor of said defendant, which motion was made at the close of the plaintiff's case for the reasons that:

(a.) The evidence presented by the plaintiff was not sufficient to sustain a verdict in his favor.

(b.) The evidence did not show permanent and total disability on or before April 30, ~~1920~~ 1919, as required, to permit the plaintiff to recover.

(c.) The evidence viewed in the light most favor-

able to the plaintiff does not reasonably lead to the conclusion that Carl R. Francis was permanently and totally disabled on or before April 30, 1919, because the evidence affirmatively shows that he had been following continuously the substantially gainful occupation of a cook and waiter since April 30, 1919, and up to the time of the trial. It was not shown that he suffered any loss under the insurance contract in that he was able to and did follow the substantially gainful occupation of cook and waiter as continuously after the lapse of his insurance as before the application for insurance.

2. The Court erred in overruling the renewed motion for a directed verdict made by the defendant at the close of all of the evidence for the same reasons enumerated and set forth in specification No. 1, and for the further reason that all of the evidence and the written admissions of the plaintiff and the medical evidence of the defendant conclusively show that the plaintiff at the time of the trial of the action was not permanently and totally disabled and therefore could not have been permanently and totally disabled on April 30, 1919, or at any intervening date and all the evidence conclusively shows that the work done by the plaintiff was continuous, was gainful, was employment, was not detrimental to his health, was never total except for a few weeks at a time, and that such total disability was never conclusively shown to be

permanent. The evidence that the plaintiff worked nine years and eleven months out of twelve years' elapsed time at an occupation which returned to him more than $15,000.00 during that time, is so overwhelming as to leave no room to doubt that the plaintiff had ability during that time to follow continuously a gainful occupation and to be inconsistent with the hypothesis that he was suffering from an impairment of mind or body that could, would and did prevent him from following any substantially gainful occupation during the twelve years covered by the evidence.

3. The Court erred in propounding the question: "Suppose he is able to work for two years and eight months, and the evidence should show that, while he has been employed we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe and as stated has not been up for three or four days at a time, and frequently during that entire period, other good natured and friendly men and women have done his work for him; that he had frequent fainting spells, as testified, then what would you say to this?" to the witness Dr. Treacy, in the presence of the jury in that said remarks and question were: improper and prejudicial in that:

(a) The jury was led to believe that the loss of one month each year on account of sickness would constitute permanent total disability;

(b) The jury was led to believe that a man who follows a gainful occupation for two years and eight months and draws pay for that time was not following continuously a substantially gainful occupation because at frequent periods he had been ill and had been in bed for three or four days at a time and because during that period other good natured and friendly men and women had done his work for him and because he had had frequent fainting spells;

(c) The jury was led to believe that if the plaintiff was able to work for two years and eight months continually, it was not necessarily evidence that he was able to work continuously under the meaning of the definition of permanent total disability.

4. The Court did not correct this error in his instructions, although given an opportunity to do so by the exception of the defendant made before instructions as follows: "The defendant wishes to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability." The jury is led to believe that the specific evidence in the instant case in the mind of the Court was overwhelming that the plaintiff was "not able to work continuously" and in effect this was a direction of a verdict for the plaintiff and against the defendant.

5. The Court erred in discussing the evidence in its relation to the definition of permanent total disability in the presence of the jury to the witness, Dr. Treacy, and in not correcting the error, if it was error, by a discussion of the concrete evidence in the case to the jury in his instructions, which the Court had a right to do and which it was his duty to do, having previously discussed the same evidence in relation to the definition of permanent total disability (Tr. 145-148).

ISSUES OF LAW

There are two main issues of law to be decided in this case:

First, was the Court in error in denying the defendant's motion to direct a verdict made at the close of the plaintiff's case and also renewed at the close of all of the evidence, as set forth in Assignment of Errors, numbers 1 and 2 (Tr. 145-6).

Second, was the Court in error in his statement of law as to the definition of permanent total disability as given in his question to the witness, Dr. Treacy, and in his instructions to the jury as set forth in Assignment of Errors, numbers 3, 4 and 5 (Tr. 147-8).

ARGUMENT

"Unless there is substantial testimony to sustain the verdict" that Carl R. Francis became permanently and totally disabled and suffered an impairment of mind or body that prevented him from following any substantially gainful occupation on or before May 1, 1919, (Tr. 17), the Court was in error in denying the motions of the defendant for a directed verdict.

> "Partial disability is not sufficient, nor total temporary disability."
>
> United States v. Hill (C. C. A. 9), 61 Fed. (2d), 651, citing:
>
> United States v. Golden (C. C. A. 10), 34 Fed. (2d), 367
>
> United States v. Thomas (C. C. A. 4), 53 Fed. (2d) 192
>
> United States v. McLaughlin (C. C. A. 8), 53 Fed. (2d) 450
>
> Gunning v. Cooley, 281 U. S. 90.

A review of the evidence of the appellee shows that he suffered from a wound incurred while insurance was in force and that this wound resulted in a partial disability for a few hours and a temporary total disability practically all of the time until his discharge from the Army, and a partial disability which was permanent in character at all times after his discharge from the Army. This is admitted and is unquestioned by the appellant. A physical examination at the time

of his discharge from the Army indicates that he was suffering from a thirty percent (partial) disability. This was unquestionably permanent and would disable him to a partial degree during the balance of his lifetime. Whether it was permanently and totally disabling, however, is the real question at issue, not whether it was either totally disabling at times or permanently disabling in a partial degree, but whether the totality and the permanence were coincident before May 1, 1919.

The only evidence of the impairment existing before May 1, 1919, which may be considered as substantial is the testimony of the appellee and the documentary evidence introduced in his cross examination taken together with the physical appearance of the wound itself. This is evidence of an "impairment of mind or body." Dr. Allard, a nationally known orthopedist, describes his impairment or disability as observed by him on January 15, 1924 in a manner that will give a correct picture of the disability and injury suffered by the appellee. Dr. Allard says (Tr. 122):

> "The subject is a well-muscled, symmetrically developed individual, with straight limbs, normal spine, square, symmetrical shoulders and normal joints and feet. The muscles are normal in tone and range of action, *except slight atrophy of the muscles of the left arm and forearm, and slight limitation in abduction of the left arm at the shoulder.* Four well-healed scars, the result of a wound

received in action, are noted on the left thorax, as follows:

"Ist, an irregular, key-shaped scar, 4 inches in length, with a 4-inch cross scar, averaging about 1¼ inch in width, situated at a point bisecting a line drawn from the nipple to the middle of the left clavicle. *This scar is adherent to the pectoral muscle and covers a bony irregularity in the 2nd, 3rd and 4th ribs.*

"2nd, a scar ½ inch wide, extending downward and forward for 3½ inches from the lower angle of the scalpula. *This scar is adherent to the subcuticular tissue.*

"3rd, a triangular scar with the apex at the posterior axillary fold, extending backward 2 inches to a 1-inch base.

"4th, an irregular scar, 3 inches in length, averaging 1¼ inches in width, situated in the axilla, *and adherent to the subcuticular tissue.*

"All scars are well healed. *The contracted biceps of the left arm measure 1 inch less than the right arm.* The forearm has most prominent circumference; *also measures 1 inch less on the left side.* There is *diminished sensation* in the region of the small, internal, *cutaneous nerve of the left arm.* There is a large varicocele and a very pendulous bag. Diagnosis: Well-healed gunshot wound left thorax, left varicocele. Slight atrophy in the left arm and forearm." (Italics ours.)

We have then a scar from the left nipple under the arm to the middle of the scalpula with cross scars, adherent to muscle and bone in places, with roughening of the bone, no loss of bone substance, a one-inch atrophy of the muscles of the left arm, allowing noth-

ing for the natural difference of a left arm in a right handed person, and some loss of sensation in the cutaneous nerve. This is the physical impairment demonstrable to the court and jury.

The testimony of the appellee shows that he was wounded; that he was operated on under ether some six times and under a local anesthetic several times; that the shrapnel was taken out; that he had to have a blood transfusion; that it caused him a great deal of pain and that he didn't really get the use of his left arm until he got to Des Moines, Iowa; that he was a bed patient for two months or two months and one-half after he had the shrapnel removed. He testified that he had empyema or pus on the lungs and that he stayed in the hospital until a day or two before his discharge from the Army. Appellee then offered the report of physical examination, Exhibit B, which describes the wound as:

> "Shell fragment wound left chest anterior, left axilla and lower angle of scapula posterior. Adhesions throughout left chest as a result. In view of occupation he is thirty (30) per cent disabled." (Tr. 25-26.)

He states that he has been paid compensation on:

> "Different percentages of disability awarded me, from 20% to total. At the present time I am getting $66.00. I imagine that means 66%.
>
> * * *

> After I was discharged from service I went to my father's home which was at that time at Walls, Oklahoma. I stayed there for about six months.
>
> * * *
>
> While there I didn't do any work at all. I was not able to do any." (Tr. 28.)

THE APPELLEE WAS NOT PERMANENTLY AND TOTALLY DISABLED WHEN HIS INSURANCE LAPSED.

If the appellee had stopped at this point, the above might have been substantial evidence to sustain a finding of permanent total disability by the jury. He did not do so, however, but proceeded to give evidence of a work record which shows that the day before his insurance lapsed, to-wit, on April 3, 1919 (4½ months, not 6 months after his discharge), he started working as a waiter (his prewar occupation) for the Wide-Awake Cafe at Fort Smith, Arkansas at $65.00 per month and board and worked for six weeks; (Tr. 29) that he then went to Montana, working five days at Cheyenne, Wyoming in the month of July, and then went to Miles City, Montana, and worked as a waiter in Miles City from about September 1, 1919, until February 5, 1920 (Tr. 29 and 47). In February of 1920 he started vocational training. The purpose of this vocational training, inferred from the evidence and from the law of which the Court will take judi-

cial notice, was the education of the appellee in an occupation which he could follow despite the handicap of the wound which he had received in the service of the United States.

The occupation of waiter and cook had been followed prior to the war by the appellee, as shown by his statement (Tr. 51) from November, 1916 to August, 1917, paying him wages of $35.00 per week and board.

THE PLAINTIFF HAS RECEIVED MORE THAN $17,000 IN PAY SINCE HIS DISCHARGE FROM THE ARMY.

The evidence shows that throughout the year 1920 he received a maintenance allowance from the Government which was $80.00 per month until August, and $152.50 per month after August, and that his training consisted of work at the State College at Bozeman and theoretical instruction as well as practical instruction in bread baking in the Dunwoody Institute in Minneapolis and then practical work with the Purity Bread Company and the Nichols Bakery and then work as a cook at the Metropolitan Cafe and the Main Cafe in Billings, Montana (Tr. 30-34). This training apparently required about the same character of physical ability and freedom from impairment as the follow-

ing of the occupation itself required. His testimony was that he left training September 1, 1922 and that he started working for the Shelling's Cafe in Billings in December of 1922 (Tr. 52). However, Exhibit D (Tr. 46) shows that from September 15, 1922 to December 1, 1922 he worked as a waiter and continued working as a waiter until May 13, 1923, when he accepted work as a cook with the Shelling's Cafe. (Note: Exhibit D was executed on August 15, 1923, and therefore is the best evidence of the exact time.) He must have left the Shelling's Cafe sometime after August 15, 1923, and worked for the Metropolitan or the Luzon Cafe as a waiter, or possibly both. (Tr. 35, 47, 53.) It is probable that he was not working for a month or two in the fall of 1923, but all the evidence is clear that beginning January 1, 1924, he worked as a cook for the Ferndale Cafe until the spring of 1931 (Tr. 128), except for the time between August 6, 1926, and July 11, 1927 (Tr. 53). During this time in 1926 and 1927 he worked for the Metropolitan Cafe, the New Bungalow Cafe and the Northern Hotel (Tr. 53). After he voluntarily quit the Ferndale Cafe in 1931 (Tr. 127), he, in partnership with James Buckley, operated a lunch room "down by the sugar factory." (Tr. 39 and 75.) Then he "worked at Casey's at Laurel.—Now I am working at the Billings Golf and Country Club." (Tr. 39.)

Upon cross-examination the plaintiff admitted that

during 1919 he earned about $350.00 and board (Tr. 56); that during 1920 he received $1400.00 as a maintenance allowance from the Government while in vocational training (Tr. 56-7)); that during 1921 he received $1890.00 as training pay (Tr. 57); that during 1922 he earned about $1800.00 (Tr. 58); that during 1923 he earned about $250.00 (Tr. 58); that during 1924 he earned about $1825.00 (Tr. 59); that in 1925 he earned about $1825; (Tr. 59); that in 1926 he earned about $1200.00 (Tr. 59); that he earned about $1685.00 a year during each of the years 1927, 1928, 1929 and 1930 (Tr. 60). This amounts to a total sum of more than $17,000. The record shows that plaintiff had lost not more than twenty-five months during this twelve year period. This is conclusive evidence of the "continuously following of a substantially gainful occupation" of a cook and waiter for a substantial period of time after the alleged permanent and total disability.

United States v. Diehl (C. C. A. 4) 62 F. (2d) 343:

"It is clear that, in the face of this work record, plaintiff cannot be held to have been totally and permanently disabled between 1918 and 1928. His general statement that he was not able to work regularly cannot be given probative force in the light of uncontradicted testimony that over this long period he did work with reasonable regularity and received substantial remuneration for his work. Harrison v. U. S. (C. C. A. 4th) 49 Fed. (2d) 227; U. S. v. Wilson (C. C. A. 4th) 50

Fed. (2d) 1063; Long v. U. S. (C. C. A. 4th) 59 Fed. (2d) 602; Nicolay v. U. S. (C. C. A. 10th) 51 Fed. (2d) 170; Nalbantian v. U. S. (C. C. C. A. 7th) 54 Fed. (2d) 63; Hirt v. U. S. (C. C. A. 10th) 56 Fed. (2d) 80; U. S. v. McGill (C. C. A. 8th) 56 Fed. (2d) 522; Eggen v. U. S. C. C. A. 8th) 58 Fed. (2d) 616."

Also see United States v. Griswold (C. C. A. 9) 61 F. (2d) 583.

The plaintiff stated that he was unable to do the work required of him as a waiter at Fort Smith, Arkansas (Tr. 29), at the Albin Cafe, Sheridan, Wyoming and at cafes in Miles City, Montana (Tr. 29-31); that he was unable to do the work required while in vocational training at Minneapolis and at the Nichols' Bakery at Billings (Tr. 32-33); and that he was unable to do the work required of him while employed at the Shelling Cafe (Tr. 34), at the Metropolitan Cafe and at the Ferndale Cafe (Tr. 35-37) in Billings.

However the plaintiff's statements of fact are flatly contradicted by his employers. Therefore, all of the statements of the witness are not to be given "full credit" (Court's instruction, Tr. 136). The distinterested witness, A. M. Loomis (Tr. 126) says:

"He performed his services satisfactorily for me. He left my employ because he wanted to take a vacation for a couple of weeks to go to the mountains."

Mrs. Loomis says:

> "I was there in the Ferndale Cafe when Mr. Francis was employed there in 1924 and on up until 1931. * * * * He complained sometimes of having a headache and being tired as a rule. I never saw him faint on the job, and I was there practically every day. * * * * We have always kept two dishwashers and they have always assisted in doing the heavy work. We don't expect our cook to do that work. * * * * He complained of not feeling well and all, but I didn't know he fainted. I am practically all the time we are open between dining room and kitchen. Mr. Francis was a dependable man, and I could depend upon his being there * * * * If it hadn't been for the fact that the work was gotten out at all times I would not have been able to keep him there." (Tr. 128-9.)

THE PHYSICAL FACTS CONCLUSIVELY REFUTE APPELLEE'S CLAIM OF TOTAL PERMANENT DISABILITY.

The appellee's statement concerning his inability to work for the Ferndale Cafe is not substantial evidence of inability and is so contradicted by the testimony of the proprietor, A. M. Loomis (Tr. 126-128) as to render it impossible of belief and unworthy of credence.

> U. S. vs. Kerr (C. C. A. 9th) 61 Fed. (2d) 800:

"The physical facts positively contradicting the statement of a witness, control, and the Court may not disregard them. American Car & Foundry Co. v. Kindermann (C. C. A.) 216 F. 499, 502; Missouri, K. & T. Ry. Co. v. Collier (C. C. A.) 157 F. 347, certiorari denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Judgments should not stand upon evidence that cannot be true. Woolworth Co. v. Davis (C. C. A.) 41 Fed. (2d) 342, 347."

This case is also much like the Kerr Case, supra, in that the appellee here says:

"I cannot lift heavy pots and pans. Others help me and I cannot do the heavy work," (Tr. 33, 37-38),

in the same way that Kerr stated:

"My leg bothered me since then and it bothers me now. I cannot work without limping. I carry a cane because I can get around better and in case I got to fall I can catch myself better."

Judge Neterer says, in U. S. vs. Kerr, supra:

"The insurance is not against a lame knee or a knee that 'bothers' or against limping or the use of a cane, but is against total and permanent disability from following continuously a substantially gainful occupation at the time of discharge, and reasonably certain to continue during his lifetime."

It is essential that a plaintiff prove that he suffered

an "impairment of mind or body" during the life of the policy and the nature and extent of this impairment. In a gunshot wound, such as in the instant case, the impairment is evident and the disability therefrom can be estimated by the Court and jury. It would seem, off-hand, that a doctor would be the only witness who was well qualified to speak with authority on a disability, its nature and extent. This rule, however, does not apply in gunshot wounds with the same measure of force that it applies to constitutional diseases. In a gunshot wound the Court and the jury, drawing upon their common knowledge of the human body, its functions and its limitations, are just as able to draw conclusions on all mechanical disabilities as any doctor who might testify as to an opinion. A doctor is not needed to give an apinion that an amputated leg or arm will handicap a man in various occupations, and even if he gives his opinion that the loss of an arm would render this particular man unable to follow continuously any substantially gainful occupation, the Court will take judicial notice that many one-armed men are following occupations of many different kinds in everyday life.

> "* * * * there are a number of occupations open to a partially crippled man." U. S. vs. Thomas (4th Circuit) 53 Fed. (2nd) 192.

In constitutional diseases, however, there is room for expert testimony on the effects of a disability re-

sulting from such a disease. It is, naturally, impossible for the lay person to form an opinion as to the disability suffered from a heart condition, an intestinal condition, a lung condition, a brain disease, or any of the organic diseases of the mind or body. We are here dependent on the testimony of physicians, and their testimony, while expert, is really divided into two disvisions, that is, testimony as to facts, and as to opinion. The X-ray is a great aid to physicians and to courts in giving tangible evidence of the impairment of internal organs, and a physician who can testify strictly as to his opinion of what exists, makes that evidence practically conclusive when he can demonstrate the existence of the condition by an X-ray picture of the impairment.

In this case when Dr. Allard testified as to the appearance of the wound, he was testifying to facts in the same manner as an engineer is called to testify as to the exact width of a road or as to the size of a room. It is true that such testimony is, strictly speaking, the opinion of an expert, but the relative weight to be given such testimony is so apparent as to make in contrast thereto an opinion as to a conclusion by a physician "that the plaintiff is unable to follow any gainful occupation" not expert testimony and of such relative weight as to be not only of no value, but so absurd as to be rejected by the court and jury as obviously false and misleading.

Dr. Allard's testimony for the defendant describing the appellee and the scars (Tr. 122-3) could be immediately verified by any lay witness by a comparison of the description with the man himself upon the witness stand, and of course should be taken as testimony of fact. His testimony that the X-ray taken day before yesterday shows no evidence of a penetrating wound of the lung tissue and that the X-ray picture indicates that the left lung is better than the right lung as to condition (Tr. 125), is a statement of opinion which is backed by real evidence subject to cross examination that there is no disability or impairment of the left lung and should be conclusive against any and all testimony of speculation and conjecture such as is recited in the testimony of Dr. Treacy:

> "This missile perforated his lung, I am positive of that, assuming that he is telling the truth always. I have no occasion to doubt he coughed and spit blood at the time, which he would not have done had it not penetrated the lung. He undoubtedly had a severe internal hemorrhage." (Tr. 92.)

The testimony of Dr. Ferris Arnold, giving diagnoses of a chronic myocarditis and enlargement of the heart, chronic nephritis, a chronic respiratory infection, neurosis and extreme mental despondency, shortness of breath, pulse 120 to 140 on exertion, low specific gravity of urine, rales in chest, casts and albu-

men in urine," (Tr. 82) is not substantial evidence and is unworthy of credence and is no evidence of value because it all relates to the year 1921, more than two years after the lapse of the insurance, and further, it is merely a statement of opinion which is not properly backed by real evidence or any corroboration by records made at the time. The doctor states:

> "I have no office records of my examination and treatment of Carl R. Francis" (Tr. 84).

Contrast this testimony with the testimony of Dr. Fortin:

> "There was no heart condition found in 1926. The heart beat was regular, no murmurs. * * * * There is no urinalysis of record; therefore I do not know whether a urinalysis was made or not. However, there was no complaint on the part of the plaintiff in reference thereto. * * * * I have the complaint here in writing as to what was stated to the doctors. * * * * In 1926 he made no complaint of either kidney or heart trouble." (Tr. 100.)

Compare it also with the testimony of Dr. James I. Wernham:

> "The urine examination was negative. The urine was normal. It is my opinion that in January, 1931, when I examined him he had no kidney disease at that time." (Tr. 108-9.)

Dr. Wernham and Dr. Fortin were testifying from memoranda which had figures and data and memoranda of examinations of the urine, which not only state their opinions, but the physical facts upon which they base such opinions and lend considerable weight to such testimony of opinion.

For the appellee to rely on testimony such as that of Dr. Arnold and that of Dr. Hanley and that of Dr. Treacy, none of which goes back to the date of alleged permanent and total disability with any facts found, when there was available to the appellee evidence of the records of the Adjutant General's Office as to his disability and evidence of an X-ray taken on behalf of the appellee by Dr. Bridenbaugh (Tr. 111), is strongly indicative of an attempt to prove by speculation and conjecture that which, if it existed, was readily and easily proven by concrete, reliable evidence. It is a well established rule of evidence that the court may reject any and all evidence which is secondary; unless the reason for the non-production of the best evidence is clearly shown. It is the contention of the appellant that all of the medical evidence of the appellee as to permanent and total disability existing prior to the lapse of the insurance or at any time, is so disputed by physical facts and so weakened by its own implausibility as to render it not such substantial evidence as would support a verdict.

The appellee presented no evidence whatsoever at

the trial as to his inability to follow any other occupation than his pre-war occupation of cook and waiter. The evidence that he was handicapped in the following of the occupation of cook or waiter is not evidence of permanent and total disability, but on the contrary the evidence that he did follow continuously his pre-war occupation of a cook, or waiter, or both, for ten years, is conclusive evidence of his ability to follow some gainful occupation. The argument is doubly convincing because his pre-war occupation was that of a cook and waiter (Tr. 51).

> "It must be borne in mind that permanent and total disability of the insured to follow his pre-war occupation; he must be disabled from following any substantially, gainful occupation." U. S. vs. Thomas, 53 Fed. (2d) 192, citing U. S. vs. Golden, 34 Fed. (2d) 367; U. S. vs. Law, 299 Fed. 61; Blair vs. U. S. 47 Fed. (2d) 109; U. S. vs. Barker, 36 Fed. (2d) 556; Nicolay vs. U. S. 51 Fed. (2d) 170.
>
> "The claim of the insured does not fail because of intermittent efforts on his part to engage in two-handed occupations, but rather because he offered no substantial evidence to show that he is unable to do the kind of work which a one-armed man can successfully perform. * * * There is no showing at the trial that all of the injuries combined made it impossible for him to follow with reasonable regularity any substantially, gainful occupation. It may be that such evidence is in the possession of the insured, but from the evidence offered to the court it would appear that the insured has made no attempt to take up any call-

ing except two-handed ones, and this failure on his part must be contrasted with testimony of all the physicians in the case, including that of his own doctor, which shows in accordance with the common knowledge open to all, that there are a number of occupations open to a partially crippled man." U. S. vs. Thomas, supra.

No better summary of conclusions on the facts and law can be written by counsel than is set out in a recent case, practically identical in all respects. United States vs. Harth, from the 8th circuit, Judge Van Valkenburgh speaking (61 Fed. 2d 541) discusses the definition, reviewing all of the cases in a most able manner. The soldier, Harth, sustained an inguinal hernia on the right side which was reduced by an operation while the soldier was still in the Army. On September 25, 1918 he received a severe shrapnel wound in the right thigh. The soldier was granted a ten per cent disability by the Board of Review. He was discharged January 28, 1919. He worked for various companies, but principally as checker and packer of plumbing supplies. He was paid $35.00 a week, but during the period of six years he was compelled to lay off only two periods of any length, one of two weeks and one of three weeks, and he says he "was absent from work for short periods in addition to these long ones." His pay during this service aggregated nearly $11,000.00. The Court says:

"There is is in the testimony serious dispute

as to whether the injury of which appellee complains is permanent, or at least was permanent in its earlier stages. * * * * The sole question then is whether the disability was total while the contract of insurance was in effect. As has been said, that contract lapsed for non-payment of premiums March 4, 1919, unless *total* disability is established prior to that date."

The Court then reviews the principal decisions defining permanent total disability and gives well merited credit to Judge Rudkin of the 9th Circuit for the leading case of United States vs. Rice, 47 Fed. (2nd) 749, that:

"But we feel constrained to hold that the manual labor performed by the appellee for the period of five years following his discharge from the Army and the compensation received for his services are utterly inconsistent with his present claim that he was permanently and totally disabled before the policy lapsed. * * * * *A finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years, is without support in the testimony. In so deciding we are not invading the province of the jury; we are simply declaring the law.*" (Italics ours.)

Judge Van Valkenburgh states that:

"In United States vs. Martin (C. C. A. 5) 54 Fed. (2) 554, * * * the Court found that a wound he had received while acting as a messenger while on the battle front had caused him suffering and

> and disability, and had, to some extent, handicapped him in business, thereby entitled him to compensation. However, it was held that 'these considerations, abstractly worthy as they are, may not have the effect in a suit on a contract of giving to plain and undisputed facts a significance contrary to its reasonable meaning'."

The Court then quotes from United States vs. Fly, 58 Fed. (2d) 217:

> "It is quite evident that appellee has been, and is, under a considerable handicap because of his condition brought about by his injuries, and is suffering a decided disability which may be permanent. But how can this court say that such disability is total, to the extent that it prevents him from 'following continuously any substantially gainful occupation,' when the undisputed evidence of the appellee, his wife, and his employer agree that he was at the time of trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer 'performed his work there with me satisfactorily,' with absence of only about a week, caused by sickness? The evident injury to the appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy, but our duty is to take the evidence as we find it and enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clearly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained."

Judge Van Valkenburgh then says:

> "Latterly there have been manifold attempts * * to make this subsequent condition of totality or permanency relate back to a period antedating such lapse. Appeal is made to the sympathy which is quick to respond to the suffering of the soldier, particularly when its cause is of service origin. This sympathy has been expressed in those cases in which work, substantially gainful, by the insured has been excused and overlooked, where it has been deemed seriously to imperil his life or health. Typical of these are cases of tuberculars, as pointed out by Judge Hutcheson in United States vs. Martin, supra, to which may be added those involving afflictions of the heart. Marsh vs. United States, Supra. The category should not appreciably be further extended. It should not be held to embrace cases of incidental pain and suffering resulting in some inconvenience and handicap to business. Such handicaps are suffered by many who work, and must work, to gain a livelihood, without hope of, or title to, compensation."

The Court then quotes Judge Sanborne from Eggen vs. United States, 58 Fed. (2) 616:

> "A total disability which has not become permanent before the lapse of a policy does not mature it, nor does a permanent disability which has not become total. * * * * He can only collect his insurance under such circumstances if he keeps the policy alive by the payment of premiums until his total disability becomes also a permanent disability."

In summing up the Court said:

> "It is to be presumed that any appreciable degree of disability is attended by discomfort, pain, or at least by inconvenience and handicap in the discharge of the normal activities of life. If such conditions are to be deemed sufficient to warrant recovery under the terms of a war risk policy, then the precision with which the degree of disability, necessary for such recovery, has been defined, was wholly unnecessary.
>
> Appellee sustained a severe wound while in service on the field of battle. It is no doubt a serious handicap in the pursuit of a substantially gainful occupation. He is entitled to compensation commensurate with the disability he has suffered. If that he now receives is inadequate, the law provides opportunity for review, and for increase, if that is found to be warranted. * * * * But we cannot approve recovery upon a contract of insurance, the express and crucial terms of which have obviously not been met."

The case at bar is stronger than the Harth case because Harth ceased work in 1926, whereas Francis has worked steadily since 1926 and the evidence is not substantial that at the time of trial he was permanently and totally disabled.

THE COURT ERRED IN PROPOUNDING TO THE WITNESS DR. TREACY A QUESTION NULLIFYING THE EFFECT OF THE GOVERNMENT'S CROSS EXAMINATION.

During the cross examination by the government of the witness, Dr. Treacy the following occurred:

> "Q. But do you believe that a man who follows it for two years and eight months, in accordance with the testimony, and draws pay for that time, is not following continuously a substantially gainful occupation.
>
> A. I believe he was during that period.
>
> Q. You believe that during that period he was continuously following a gainful occupation?
>
> A. Yes.
>
> THE COURT. Suppose he is able to work for two years and eight months and the evidence should show that, while he has been employed, we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he had been ill from the cause you describe, and as stated, has not been up for three or four days at a time, and frequently during that entire period, other good-natured and friendly men and women have done his work for him; that he has had frequent fainting spells, as testified, then what would you say as to this?" (Tr. 97-98.)

After the court had asked this question, Dr. Treacy replied:

> "That is a different question from Mr. Evans'.

> I would say that he was not capable of following a gainful occupation as described by the law, under the circumstances you (the Court) give here." (Tr. 97-98.)

What possible inference could the jury make except that the Court was stating the legal definition of permanent total disability to be applied to the instant case by the jury?

If the Court had let the matter rest when counsel for the defendant had practically nullified the value of the testimony of the witness, Dr. Treacy, by getting the unequivical admission from him that "during the period of two years and eight months the plaintiff was not permanently and totally disabled because he was then," in the opinion of the witness, "continuously following a gainful occupation," there probably would have been no error. That the effect of the admission by the witness was completely nullified by the question of the Court is clearly proved by the fact that plaintiff rested his case at that point.

THE COURT'S ERROR WAS NOT CURED BY PROPER INSTRUCTIONS.

The Court did not correct the prejudicial error committed in its question propounded to Dr. Treacy when under cross examination by the defendant by subsequent general instructions to the jury. The attention of the trial court was directed to what the defendant now assigns as error (Tr. 132). The obvious and prejudicial effect of the colloquy between the witness Dr. Treacy and the Court most clearly appears from the language of the Court in the following case, which indicates the necessity of a specific instruction in the circumstances assigned as error in this case.

Order of United Commercial Travelers of America vs. Nicholson, et al., 9 Fed. (2d) 7, 14:

> "The extent to which the court should go in reviewing and commenting on evidence depends in a great measure on the circumstances of the particular case. In a case such as this in which reliance is placed on expert or opinion evidence, it is important to point out to the jury that the opinion of an expert has no probative force in case the jury fails to find that the facts assumed in the hypothetical question were true, and the court should not permit a jury to be influenced by evidence on which they cannot, within the laws of close reasoning, make a finding. We think the jury in this case might well have been instructed, in considering purely expert testimony and the weight to be attached to it, that it was their duty

to consider whether the facts embodied in the hypothetical question had been established by a preponderance of the evidence."

It is true that in this respect the Court stated:

> "By no remark by the Court during the trial, nor by these instructions or otherwise, does the Court, or did the Court, express any opinion as to the facts in this case. It is for you and not the Court to determine what the facts are." (Tr. 137.)

The prejudicial remark, however, related to the law rather than to the facts. The Court did not clear up the matter, but rather increased the misapprehension of the jury when it stated that:

> "Testimony has been given by certain witnesses who in law are termed experts, * * and there is no rule of law which requires you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness" (Tr. 138)

by adding to that statement:

> "When expert witnesses testify to matters of fact from personal knowledge, then their testimony as to such facts within their personal knowledge should be considered the same as that of any other witnesses who testified from personal knowledge." (Tr. 138.)

This instruction did not define for the jury which evidence of Dr. Treacy was opinion evidence and which evidence was factual evidence, and they had a right to believe that all of his testimony was as to facts rather than as to conclusions and opinion.

Appellant contends that in this case the only possible way of correcting the error alleged was for the Court to refer directly to his remarks and explain them in relation to the correct definition of permanent total disability. Failure to do so, left the jury in the same place as in the case of Cummings vs. Pennsylvania Railway Company, 45 Fed. (2d) 152:

> "* * * * Nothing short of an express repudiation of that charge coupled with a correct statement of the law can be thought to have erased the erroneous impression from the minds of the jurors. The subsequent charge given, not as an express correction and with no attempt to point out to the jury the difference between it and what had previously been said, would, in all probability, have been treated only as a restatement of what had gone before. Quite likely the jury was unaware of any change. At best, it did know of it and was left to take its choice between two inconsistent statements of the law, one of which was wrong and one right. This so deprived the defendant of its right to have the jury plainly and correctly instructed to the end that there should be no misapprehension of the law that the exception to the charge based on this ground must be sustained. Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 20 S. Ct. 967, 44 L. Ed. 1127; Memphis Furniture Manufacturing Co. v.

Wemyss Furniture Co. (C. C. A.) 2 F. (2d) 428, 432."

We, therefore, submit that the judgment should be reversed.

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